

IN THE

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**Supreme Court of the United States**

JAMES RODAK, JR., CLERK

October Term, 1973

No. 72-1035

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JULIA ROGERS,*Petitioner,*

v.

LEROY LOETHER and MARIANE LOETHER, his wife,  
and MRS. ANTHONY PEREZ

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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**REPLY BRIEF**

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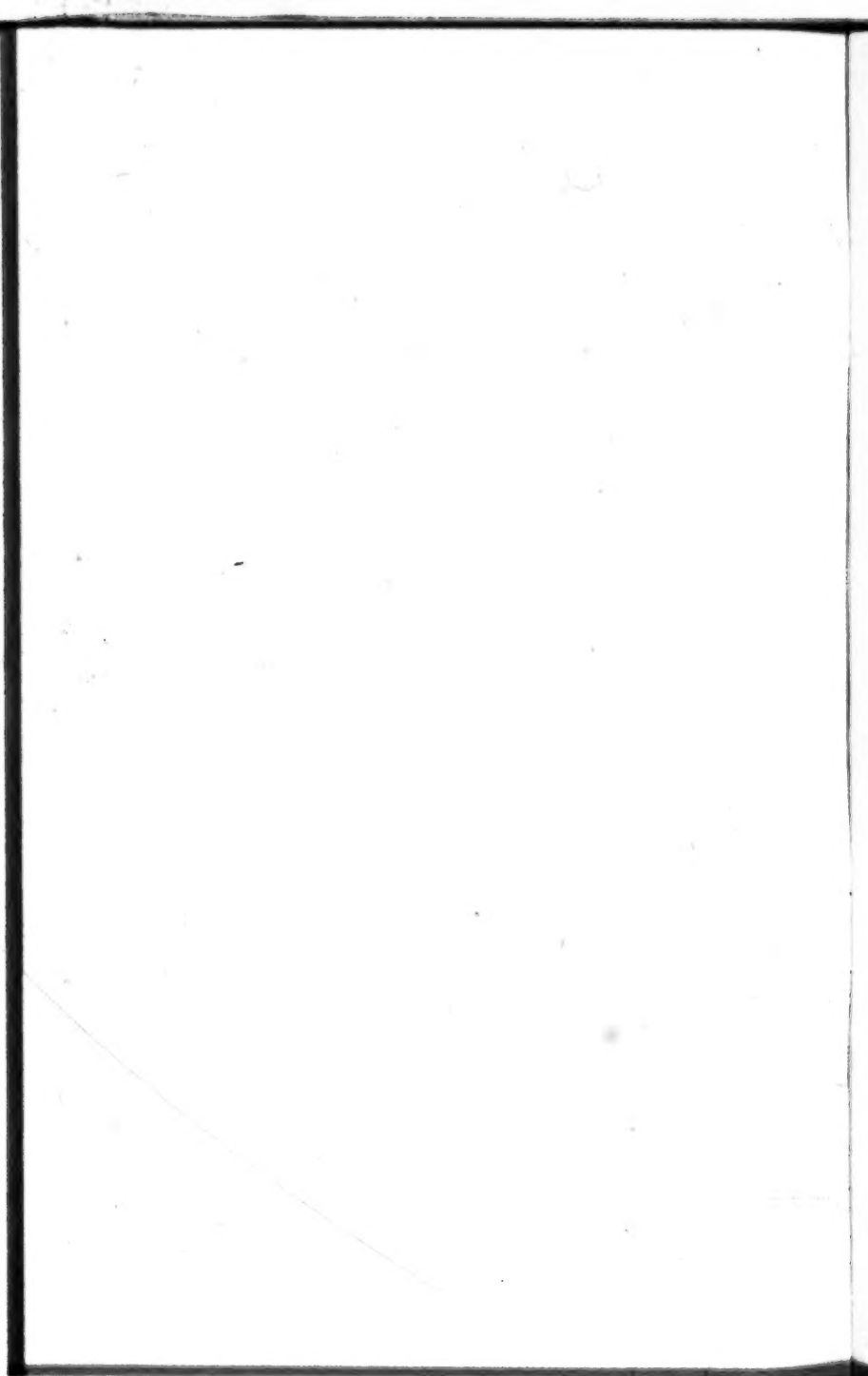
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**REPLY BRIEF**

It seems fair to say that Respondents, in their Point I, argue only *pro forma* the statutory construction issue in this case. In the proceeding below, Respondents urged that Title VIII did not forbid jury trials in housing discrimination litigation. Defendants' Brief in Support of Jury Trial, p. 6. The Court of Appeals itself went even further, and held that Title VIII actually required jury trials. Appendix, pp. 71a-72a. In this Court, however, Respondents have, for all practical purposes, abandoned both these positions. Respondents urge that the statutory language is ambiguous, the legislative history unhelpful, and congressional concern about hostile juries irrelevant, and conclude

Even if the Act can be fairly construed to mean that the factual issues in all private enforcement ac-

tions must be tried by a judge without a jury, the constitutionality of the statute under the Seventh Amendment must be resolved. This the plaintiff concedes.<sup>1</sup>

Respondents describe the sole "question presented" as whether the Seventh Amendment, not Title VIII, requires a jury trial in this case.

Petitioners agree there is no real issue as to the clear meaning of Title VIII, which plainly bars jury trials in this litigation. Respondents devote the bulk of their brief<sup>2</sup> to the applicability of the Seventh Amendment, as though Congress' decision to deny jury trials had no significance other than to require that the constitutional question be reached. In fact, however, this Congressional decision is also of great importance to the manner in which the constitutional issues in this case should be resolved.

It would be one of the strangest ironies ever to arise from the chance meetings of legal doctrines if the first federal statute in modern times overturning the "common law" regarding racial discrimination in housing were to be invalidated in part on the ground that that statute merely provides for a suit at common law subject to the Seventh Amendment. The American "common law" blandly assimilated slaves to other property, awarding the writ of replevin in respect of their persons. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). After emancipation the "common law" set its whole corpus

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<sup>1</sup> Brief For Respondents, pp. 8-11.

<sup>2</sup> Respondents allege that "there was no request for a permanent injunction in the Complaint." Respondents' Brief, pp. 2, 15. This is inaccurate. The Complaint asked "that defendants be directed to abide by their agreement to rent the above described premises to the plaintiff." Appendix, p. 6a.

"neutrally" behind the property and personal "rights" that made discrimination possible, contributing not one iota to the elimination or softening of discrimination. It is only now, when it may serve to oust Congressional choice of an efficacious remedy, that it is first discovered that the "common law" has anything whatever to do with ending racial discrimination.

While the Seventh Amendment speaks of "Suits at common law", this is not a "Suit at common law". No "Suit at common law" would have been available, anywhere at any time, in a case at all resembling this one on the merits. Brief for Petitioners, pp. 27-36. It is necessary, therefore, to ask, first, how it could have come about that the jury trial command of the Seventh Amendment ever was extended to cases not *literally* covered by the words of the Seventh Amendment, and, second, whether the method by which this extension was effected is fairly applicable to the cause of action set up by this statute and asserted in this case.

The answer to the first question is obvious. In a series of cases beginning with *Parsons v. Bedford*, 3 Pet. (28 U.S.) 433 (1830), the Seventh Amendment guarantee has been extended to "Suits" which, while not literally "at common law", are so closely analogous to such common law actions that the extension of the Seventh Amendment to those suits would preserve the constitutional values underlying the Amendment. This analogic style of reasoning marks a number of great constitutional cases. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *Boyd v. U.S.*, 616 (1886); *Wesberry v. Saunders*, 376 U.S. 1 (1964); *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Parsons* and its progeny Congress had not indicated how the actions should be tried, and this Court was forced to reason by analogy to decide whether or not jury trials should be required.

The question under *Parsons* was whether an action could have been maintained at common law or was closely analogous to such a common law action. Respondents urge this must be an action at common law because it could not have been maintained in equity. Respondents' Brief, pp. 20-21. But this argument is specious, for in 1791 the instant action could not have been maintained *either* at law *or* in equity. Litigation under Title VIII like litigation under the National Labor Relations Act, involves an entirely new substantive right and is a proceeding without significant precedent at law or in equity; such new causes of action do not fall within the reach of the Seventh Amendment, and Congress is free to require or prohibit jury trials as it sees fit. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Petitioner has found no case, and respondents cite none, in which this analogic extension of the Seventh Amendment has been carried to the length of invalidating an Act of Congress; it has so far served only as a guiding principle for *judicial* order-keeping. The extension by analogy of the Seventh Amendment may well be inappropriate, and certainly should be undertaken with greater restraint, when the effect of such an extension would be invalidate an important federal statute. This consideration has its maximum force when the congressional judgment in favor of non-jury trials involves enforcement of a statutorily created substantive right totally unknown to the "common" law" in 1791 or long thereafter. Indeed, it is hard to see why Congress, having full power over both national "law" and national "equity", could not constitutionally classify a radically new proceeding as "equitable" rather than "legal" on the ground (1) that adequate relief could not be had in a proceeding at law because of jury prejudice or problems of delay, (2) that legal and equitable modes of relief would

usually be inextricably entangled, or (3) that the new rights involved had no precedent in law or equity in 1791, or most closely resembled the obligations of equitable servitude imposed on the owners of real property.

All the decisions cited by respondents concern situations (1) where Congress had not spoken, and (2) where the substantive right concerned was evidently a minor variation at most on a well-known common-law right. Neither *Dairy Queen v. Wood*, 369 U.S. 469 (1962), *Beacon Theaters v. Westover*, 359 U.S. 500 (1959), nor *Ross v. Bernhard*, 396 U.S. 531 (1970) remotely resemble the instant case. Only in *Katchen v. Landy*, 382 U.S. 323 (1966) was the constitutionality of a federal statute at issue, and in *Katchen* the statute was upheld out of express deference to Congress' decision in favor of non-jury trials.

Congress' decision to prohibit juries in Title VIII litigation was intended in part to assure that a final judgment could be rendered as quickly as possible in these cases. Brief for Petitioner, 49, n.60. Such a congressional command must of course be heeded even in a case where, despite the availability of a non-jury trial, other developments have brought about a delay. In *Katchen v. Landy*, 382 U.S. 323 (1966), this Court upheld the validity of a summary non-jury bankruptcy proceeding on the ground that it was essential to speed and efficiency in certain bankruptcy hearings, even though the particular case involved was already several years old due to appeals. In this case Respondents' intransigence and the District Court's desire that the parties engage in protracted negotiations delayed the holding of a final hearing on the merits. Respondents do not seriously contend, however, that Congress acted unreasonably in prohibiting juries in the interest of efficiency, and the statutory command applies without exception to all litigation under Title VIII.

This Court should be particularly reluctant to extend the Seventh Amendment by analogy when to do so would be to overturn Congress' decision as to the form of proceeding "necessary and proper" to enforce the Thirteenth and Fourteenth Amendments. Compare *Jones v. Mayer Co.*, 932 U.S. 409 (1968). The constitutional values which might be advanced by an analogic extension of the Seventh Amendment must compete with the equally important constitutional values of equal protection of the laws and freedom from racial discrimination rooted the institution of slavery.

Petitioner is not required to prove, nor this Court required to decide, that a non-jury trial in a Title VIII action will best effectuate the Thirteenth and Fourteenth Amendments. The Constitution confides that decision to the Congress, and Congress has reasonably concluded that, in a locality where racial discrimination in housing is a problem, it will be hard to empanel twelve jurors none of whom will be hostile to the objectives of the 1968 law. The selection of a fair "cross-section" of the community will not alleviate this problem.<sup>3</sup>

Congress' decision in this regard is amply supported by experience in civil rights litigation. Since the passage of Title VIII jury trials have been requested in 10 housing discrimination cases. In all but one instance it was the defendant who requested the jury, and the plaintiff who opposed it. See Appendix, p. 1aa. Similarly jury trials

<sup>3</sup> Compare Respondents' Brief, p. 11. Respondents urge that the Jury Selection and Service Act of 1968 and the 1972 amendments to 28 U.S.C. § 1863 assure such a cross-section. But those provisions were designed to prevent the discriminatory exclusion of black prospective jurors, not to deal with the prejudiced white jurors. Moreover it was for Congress to decide what effect the 1968 Jury Selection Act would have on proceedings under the subsequently enacted provisions of Title VIII, and Congress chose to prohibit jury trials.

have been requested in 40 Title VII racial discrimination cases since 1964; in 36 of these cases the request came from the defendant. See Appendix, pp. 1aa-4aa. In Title VII sex discrimination litigation, however, a jury has only been requested in one case, and the request was made by the plaintiff. *Gillin v. Federal Paperboard Inc.*, 53 F.R.D. 383 (D.Conn. 1970). Requests for juries in § 1981 cases alleging racial discrimination in employment have uniformly been made by the defendants. See *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970); *D'Meza v. Schultz*, Civ. Act. No. 71-2025 (D.N.J.) (order dated August 16, 1971).

Congress' decision to require non-jury trials to avoid problems of local prejudice finds significant precedent in the earliest practices of the courts of equity. In the fourteenth century it was common for petitioners to seek the aid of the King where local prejudice or the power of the defendant prevented a fair hearing and an adequate remedy at law. These cases were at first referred by the King to the Chancellor, and eventually presented directly to the Chancellor. See 1 Chaffee and Simpson, *Cases on Equity* 4-6 (1934); 1 Maitland, *Constitutional History of English Law*, 222 (1909); 1 Holdsworth, *History of English Law*, 405-406 (3rd ed. 1922). See also Bailden, *Selected Cases in Chancery*, v. XXI-XXIV (1896) (Case No. 24 (1397), petitioner can find no one "who dares act" as his lawyer; Case No. 35 (1397), unbiased jury cannot be found; Case No. 41 (1399) defendant has so many co-conspirators that fair jury cannot be found.) Equity's practice of hearing such cases fell into disuse after the fourteenth century as the turbulence of the Middle Ages waned and the rule of law became more firmly established. It was certainly within the power of Congress to revive this equitable practice to deal with a similar problem of local hostility to

open housing which Congress believed would prevent any adequate remedy at law. See Note, *The Seventh Amendment and Congressional Provision for Civil Non-Jury Trial*, 83 Yale L.J. No. 2 (Dec. 1973).

In sum the substantive right established by Title VIII was root and branch unknown to the common law, and this case is clearly not within the literal scope of the Seventh Amendment. In the past this Court has never extended by analogy the jury trial requirement where Congress has decided against such an extension, and where the effect of that extension would be to invalidate a federal law. Moreover, in this case any constitutional values which might be served by extending the jury trial requirement collide head-on with the pre-eminent constitutional value of racial justice established by the Thirteenth and Fourteenth Amendments and vindicated by Title VIII. In such a collision of constitutional values Congress' desires are of particular importance, for the first concern of the framers of the Reconstruction Amendments was to give Congress power to deal effectively with problems of racial discrimination. See Bickel, "The Original Understanding and the Segregation Decision", 69 Harv. L.Rev. 1 (1955). No case heretofore decided by this Court, and no decision extending the Seventh Amendment, has ever presented features anything like these. As between extending the right of jury trial and effectively vindicating the Thirteenth and Fourteenth Amendments, Congress' decision — that non-jury trials are "necessary and proper" to end racial discrimination — should be upheld.

**CONCLUSION**

For the foregoing reasons, section 812(c) is constitutional and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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